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## **Back to the future? The long view of probation and sentencing**

**Peter Raynor**

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### **Abstract**

This article reviews the history of the Probation Service's contribution to sentencing and revisits the changing theories and understandings that have influenced this role at different times. Through most of its history probation was seen as an alternative to punishment and required the consent of the probationer. Since the 1990s these fundamental assumptions have been changing, and the article explores some of the social and political context of these changes. It argues (with the help of John Augustus, Charles Dickens and others) that the probation service's input of social information into sentencing has been a contribution to social justice, but recent changes in the reporting role have made this much more difficult. Finally some suggestions are made about how probation's traditional input into sentencing might be restored.

### **Keywords**

Probation, Courts, sentencing, social enquiry reports, rehabilitation, social contract.

In a fascinating recent collection of retired Chief Probation Officers' reflections on their probation careers, Roger Statham comments that 'the probation officer, as the servant of the court, with a full social enquiry report, later to be sacrificed by short cut mechanisms designed to speed up the courts, was a key part of ensuring that the criminal justice system had an element of social justice' (Statham 2014, 188). In this article I try to revisit and restate some of the ideas about the Probation Service's contribution to sentencing which influenced my own practice as a probation officer in the 1970s and have continued to influence my subsequent work as an academic. In the process I will be referring to some of my earlier work, not for self-advertisement but because it is close in spirit and argument to some of the ideas I summarise here. My aim is to explain what might be meant by 'ensuring . . . an element of social justice'. Although roles and expectations change over time for both good and bad reasons, it is interesting to take the long view of probation and sentencing and to begin at the beginning.

### **Probation fundamentals**

From the very earliest times probation was clearly understood as an alternative to custodial punishment. John Augustus, who worked on a voluntary basis in the courts of Boston, Massachusetts in the middle of the nineteenth century, is often regarded as the first probation officer. Augustus himself described how he stood bail for offenders who signed a pledge to abstain from alcohol, and if they made progress he would try to persuade the Court to pass non-custodial sentences 'instead of the usual penalty – imprisonment in the House of Correction' (Augustus 1852, 5). He added that 'generally, a drunkard could more effectively be reformed by kindness than by imprisonment' (Augustus 1852, 9). 'Probation' originally meant 'proving' or 'testing': a defendant's promise to stay out of trouble was tested over time, and if she or he succeeded, punishment was seen as unnecessary because reformation

was already happening without it. On the other hand, if offending continued the decision to avoid punishment could be reversed, but people were not left to struggle with adverse circumstances on their own. Supervision was available from a person appointed by the Court. A hundred years after John Augustus, one of the best short summaries of the nature and purpose of probation was provided by Max Grünhut, the German legal scholar who introduced the study of criminology at Oxford after leaving his university post in Bonn to escape the Nazi regime: ‘Probation is the great contribution of Britain and the USA to the treatment of offenders. Its strength is due to a combination of two things, conditional suspension of punishment, and personal care and supervision by a court welfare officer. With the growing use of probation, social case work has been introduced into the administration of criminal justice . . .’ (Grünhut 1952, 168).

This, broadly speaking, was the model which continued in England and Wales through the 1960s and 1970s: probation became firmly embedded as the Welfare State’s bridge into the criminal justice system, and although probation officers became increasingly involved, through post-custodial after-care, with people whose punishment had not been subject to ‘conditional suspension’ there was still, in most cases, an element of conditionality: supervision on licence often meant earlier release, and in the case of adult parolees it had to be applied for. Some prisoners preferred not to apply. In addition, post-custodial supervision required good behaviour and compliance with instructions, with the possible sanction of recall. The basic paradigm of supervision was the probation order, and other forms of supervision were carried out as if they were variations on this core model. The development of probation services in the third quarter of the twentieth century was supported by the same processes of post-war reconstruction that led to the development of other aspects of the Welfare State, making resources and opportunities available to people in difficulty and also

enacting a newly widespread belief that the State had a broad responsibility for the welfare of citizens. A new social contract obliged the State to create and maintain the conditions which offered citizens the opportunity to develop themselves and aspire to a reasonable standard of living and way of life, in return for citizens' willingness to behave prosocially and contribute to society. The criminal justice system was to be rebuilt around opportunities for rehabilitation and reform (Home Office 1959) and the expansion and professionalization of probation was part of this effort.

When I joined the Probation Service as a trainee in 1970 it felt like the most creative and innovative part of the criminal justice system, working towards a new model of justice and a new way of dealing with people who offended if they showed interest in the possibility of turning their lives around. The prison population was less than half what it is today, but even so we thought it was too high. The idea of 'contract' or explicit agreement on aims, roles and tasks was becoming popular in social work (see, for example, Reid and Epstein 1972) and many of us began to think of probation as a 'contract' in which the defendant gave undertakings about future behaviour to the Court and the Court agreed to suspend punishment on condition of good behaviour, while also offering support and guidance through a court officer whose job was to 'advise, assist and befriend' (Parliament of the United Kingdom 1907) and also to inform the Court about whether the agreement was holding. If the agreement was broken the Court had the authority to review it and to decide whether to let it continue, or to implement the conditionally suspended punishment. This contract provided a tailor-made option for people who wanted to improve their lives and desist from offending but who needed some support and guidance to make this work, and to maintain their commitment and motivation. Versions of this model were put forward by several writers on

probation topics (for example Bryant et al. 1978; Raynor 1985) and were quite well received, particularly by probation trainees who in those days were trained with and as social workers.

Along with the commitment to providing an alternative to custody, the contractual model of probation seemed to make sense, not least to many probationers themselves. Of course consent and co-operation could be temporary or tactical or partial or completely fake, but it could also provide supervisors with a basis for discussing motivation and compliance. To sum up, there seemed to be three basic principles underlying our work: diversion from custody, engaging the co-operation of probationers, and trying to help them to comply by finding ways of living without crime. In other ways, however, there are no grounds for any rose-tinted hindsight: we had no real outcome-based evidence to support our practice, we all did things differently and could not all have been right, we were prone to changing fashions and, on average, research suggested that we were not particularly effective (see, for example, Folkard et al. 1976). In addition, although ‘consumer’ studies tended to show that probationers mostly had a positive view of probation officers, and particularly of officers who were understanding, found time to listen to them and helped them (Mair and May 1997; Mantle 1999) few people would actually volunteer to be supervised, and more recent research points to the inconvenience of reporting and the unwelcome sense of being under surveillance (Durnescu 2011, McNeill 2018).

In an article published in 1984, in response to the first draft of what later became SNOP (the Home Office’s ‘Statement of National Objectives and Priorities’, 1984) I argued that although the Home Office was stating clear objectives (principally that probation’s job was to provide non-custodial alternatives to prison and to persuade the Courts to use them) it did not set out clear underlying principles. I suggested that the probation service’s mission might be

to exemplify an alternative approach to criminal justice based on reducing coercion and encouraging offenders' participation in their own rehabilitation (which might nowadays be called the co-production of desistance [Weaver 2014]), as well as reparation where possible to the victim or the community. This was an attempt to join up the concepts of diversion, contract and helping. Of these, diversion remained a centrally supported policy until 1993, and annual volumes of probation statistics counted the number of probationers who were first offenders (expected to reduce) and the number who had previously been in prison (expected to increase). These were useful proxy measures of diversion, designed to show whether probation was moving far enough 'up tariff' to compete with short prison sentences, and for a while they showed that this was in fact being achieved. Then in 1993 the new Home Secretary Michael Howard made his famous 'prison works' speech to the Conservative Party's annual conference (Howard 1993), killing off all the hopes of wider decarceration that had been raised by the 1991 Criminal Justice Act and triggering an increase in prison numbers which has continued almost without a break ever since. (Recent slight reductions are a hopeful sign, if they continue.)

Within the Probation Service managers stopped talking about alternatives to custody: this very quickly became Oldspeak, and attention shifted to how to make supervision more effective, eventually generating useful innovations under the What Works initiative of the late 1990s (Underdown 1998). However, the statistics continued to be collected and published; in an article in 1998 I pointed out that the number of first offenders was rising and the number of previously imprisoned probationers was dropping, suggesting a drift 'down tariff' (Raynor 1998). Some managers dismissed these concerns as 'no longer relevant'; however, recent international research by Marcelo Aebi and colleagues (Aebi et al. 2015) has shown that in almost all European countries the use of community sentences has grown

alongside growth in imprisonment, and probation appears to have widened the criminal justice net. Certainly in England and Wales the pattern during the last part of the twentieth century was consistent with this: probation and prison numbers *both* increased, and fines decreased. Similar points have been made about the USA by Phelps (2013).

When the strategic focus on diversion from custody was lost, diversion stopped happening. In this way one of the ‘fundamentals’ discussed at the beginning of this article fell victim to populist punitiveness in 1993. In addition, the ambitiously decarcerative Criminal Justice Act of 1991 aimed to rebrand probation as ‘punishment in the community’ (Home Office 1990) in the belief that wider public support for the use of community sentences could be achieved only if they were seen as punitive. Although this was presented mainly as a change of language, some commentators warned that this could have wider consequences and lead to more punitive expectations (Rumgay 1989). When the anti-custodial elements of the 1991 Act were all repealed by politicians who either lost their nerve or had never really supported them in the first place, ‘punishment’ remained as an objective added to community sentences and in due course the requirement of consent was abolished in 1998 on the grounds that punishments do not require consent (Raynor 2014). So two of the fundamentals did not last until the end of the century. The legal requirement to ‘advise, assist and befriend’ also disappeared, and official support for helping began to look weak until rediscovered as part of effective rehabilitation in the ‘What Works’ movement (Robinson 2008). In the meantime the training of probation officers had been separated from social work training, and the pros and cons of this are still debated.



## **Social enquiry and sentencing**

Researchers who wrote in the 1980s about the role of social information in sentencing (that is mainly the information provided in probation officers' reports to sentencers) sometimes argued that it had two functions. One was to help to identify circumstances which contributed to the offending: circumstances which in some cases could potentially be changed, becoming targets in a supervision plan which might contribute to reduced re-offending. This is the same role potentially played by the 'needs' component of risk-need assessment today (Raynor 2007). The other function arguably served by social information lay in its influence on judgements about blameworthiness. People whose circumstances or background allow very limited opportunities to avoid offending can be regarded as less blameworthy than those whose circumstances are rich in opportunities for self-realization without crime. Both are guilty unless actually compelled to offend, but the level of blame, perceived seriousness, disapproval, denunciation and deserved punishment are all affected by the extent to which people's offending is the outcome of social deprivation and limited opportunities (Raynor 1980; Bottoms and Stelman 1988. A fuller exploration of these arguments can be found in Raynor 2018.) Enabling sentencers to be more responsive to the unequal situations and opportunities of those who come before them is part of introducing 'an element of social justice' to sentencing. This way of thinking also suggests that whilst it is clearly up to sentencers to judge the seriousness of offending, social enquiry reports used to provide some of the information to enable them to do this. The change to pre-sentence reports in 1992 did not bring about any immediate change in the reporting role (Collett and Stelman 1992) but since the 1990s the focus on social context has been largely replaced by a focus on the risk of further offences (Gelsthorpe et al. 2010). Risk, however, is often seen as an individual attribute, whereas the old *social* enquiry report at least pointed to the possibility that people's

offending might sometimes be connected with pressures or disadvantages beyond their own control.

The opportunity for this kind of argument and for complex exploration of people's circumstances is now seriously constrained by time. In the 1990s research showed that there was little difference between the quality of short-notice reports and standard reports (Gelsthorpe and Raynor 1995), at least when compared with the wide variation in quality which existed regardless of the time taken. However, in those days a short-notice report was one prepared in less than 7 days, and a standard report could take several weeks. Only 15% of the research sample were completed within one day. Even so, it was found that short-notice reports were less thorough in their discussion of offending behaviour, less likely to include information from third parties (such as the defendant's family or employer) and less likely to propose more complex requirements in community sentences. Today the situation has changed completely. Standard Delivery reports, roughly equivalent to standard reports in the 1990s, made up just 7 per cent of reports in 2016 (Ministry of Justice 2017; Robinson 2017) whilst the majority of reports are presented orally on the same day as the request is made. Quality is now measured by timeliness rather than content, and the time spent in actual discussion with a defendant can be as little as 15 minutes (Robinson forthcoming). As Robinson points out in the same article we should not assume that this represents a 'narrative of decline': expectations and requirements change, and timely justice is important. The staff who provide these rapid reports are on the whole doing a difficult job well. However, the transformation of the social enquiry function is another indication of the shift away from what the twentieth century saw as probation's goals. In the 1970s research showed that the average social enquiry report required four hours and 39 minutes of preparation, usually

spread over weeks, and one hour and 28 minutes of this was on average spent interviewing the defendant and significant others (Davies and Knopf 1973).

### **Neoliberal social discipline and the Ghost of Christmas Present**

Criminal justice policy and practice is intimately linked to social policy, not least because they often have to deal with those for whom social policy has failed. At the beginning of this article I suggested that social policy represents another broader kind of contract, namely a social contract between the State and the citizen. During the second half of the twentieth century the British and European Welfare States were based on risk-sharing, collective responsibility for social provision, some redistribution of resources and a recognition by the State that if citizens were expected to meet expectations of prosocial behaviour and contribution to the common good, the State had a corresponding obligation to use its resources to support the conditions which made this prosocial contribution possible (for example, education, housing, health and the prevention of avoidable poverty). In Britain this took the form of an explicit commitment to combat the Five Giants of want, disease, ignorance, squalor and idleness (Beveridge 1942). The rehabilitation of offenders can be seen as consistent with part of this post-war social contract: the State requires desistance from offending, but in return has an obligation to assist in removing avoidable obstacles to this. (For a more detailed account of this argument see Raynor and Robinson 2009.) However, this social philosophy has been progressively eroded since the 1980s by the gradual normalization of what might be called neoliberal social discipline: market economics, acquisitive individualism, reduced taxation and reduced social protection are justified by the belief that people are largely responsible for their own social difficulties and need to be 'responsibilized' (Rose 1990) to sort them out themselves. Essentially this is a social philosophy of 'sink or swim', promoted mainly by those lucky enough to be swimming.

In Charles Dickens's well known story 'A Christmas Carol' published in 1843, Mr Scrooge asks the Ghost of Christmas Present what is to be done for the children afflicted by Ignorance and Want. The Ghost replies 'Are there no prisons? Are there no workhouses?' If the Ghost were to revisit Britain today he would find no workhouses (instead he will find benefit sanctions and food banks) but he would still find plenty of prisons. Some of them are in the same places and even the same buildings. Some of them are verminous, dangerous, and driving vulnerable prisoners to suicide in unprecedented numbers. Neoliberal social discipline does little for those who sink. Recently, however, there is a glimmer of hope that some politicians may be rediscovering the social contract of rehabilitation: in a recent speech David Gauke, the latest in a series of Conservative Justice Secretaries, stated: 'The way I see it is that prisoners have a contract with the State. By serving your sentence and conforming to the rules, you are repaying your debt to society. If you do that, you will find the State and the prison system backing you up . . . ' (Gauke 2018). This is a belated but very welcome recognition that something must be done, and it is to be hoped that the resources (financial and human) can be found to make a difference.

### **Moving beyond the blame game**

Questions about how we found ourselves in the current predicament, and who is responsible for it, will probably be debated for years to come. There can be little doubt that the new configuration of probation services created by Transforming Rehabilitation (TR) is, so far, at best a failure and at worst a disaster, as pointed out politely but firmly in a series of damning reports by Her Majesty's Inspectors (see, for example, HM Inspectorate of Probation 2017). There are many possible candidates for a share of the blame: they might include adaptable probation managers who saw new opportunities; smart private sector operators who over-

promised in order to secure contracts and then under-performed and made staff redundant in an attempt to protect profits (an unsuccessful attempt so far); dutiful civil servants who showed great commitment and energy in devising ways to implement what their political masters demanded, but may sometimes have lost their traditional focus on the public interest; and finally, but most importantly, politicians with an ideological commitment to transferring public sector assets to the private sector and marketising the delivery of services.

Private sector companies have been lobbying politicians since the 1990s to get a share of the public sector cake and transform taxpayers' money into private profits, and Governments of both major Parties have listened to them. I remember attending meetings on criminal justice policy during the New Labour Government where private sector companies were seeking to extend their criminal justice involvement beyond prisons and tagging and into mainstream community penalties. My query about whether there was an evidence-base to support such a move was met by literally hissed accusations of ideological bias. Well, gentlemen (they were all men), I am still waiting for the evidence. Eventually, of course, they found their keenest supporters on the Right of the Conservative Party, but the legislation used to implement Transforming Rehabilitation was devised and passed by a Labour Government. Lack of continuity in key political appointments has also contributed to short-termism and over-hasty initiatives: with six different Justice Secretaries in eight years since the 2010 election, some have seemed more interested in making their mark politically than in grappling with the long-term problems of the criminal justice system. One in particular, perhaps experiencing a triumph of self-esteem over realism, believed that he could see the right way ahead without any need for piloting his reforms or gathering evidence (Grayling 2014); another found it convenient to legitimize contempt for expert knowledge by asserting, during his campaign in support of withdrawal from the European Union, that 'people in this country have had

enough of experts' (Gove 2016). In Brexit Britain we are no strangers to gratuitous acts of self-harm, but nevertheless we should still see them and name them for what they are. The privatisation of probation services was not the worst of our recent political mistakes, but it was one of the most unnecessary and avoidable.

It would, however, be a mistake to blame all the Probation Service's current problems on TR. They go back further, to a series of changes which were all meant to be improvements, but often had little evidence to support them. During the last twenty years, steps on the way to where we are now have included abolition of the requirement of consent to a community sentence, which undermined the legal basis of the probation contract and cast the offender instead as a passive recipient of supervision and punishment (Raynor 2012, 2014); the creation of a national Service in 2001, displacing local involvement and the role of magistrates in the governance of the Service and undermining the sense that the Service 'belonged' to the courts; the limited success of the 'What Works' initiative from 1999 to 2003, due probably to overcentralized management and trying to move too fast (Raynor 2004); the abolition of the probation order, replaced in 2000 by the Community Rehabilitation Order and in 2003 by the generic community order; the creation of the National Offender Management Service (NOMS) in 2004, creating greater integration in the penal system but restricting scope for probation services to set their own agenda (this largely unlamented organization disappeared in 2017, only to be replaced by Her Majesty's Prison and Probation Service which looks rather like NOMS); and the inclusion since 2013 of a 'punitive requirement' in every community sentence, following an earlier survey (Casey 2008) which concluded, in an echo of the earlier arguments for 'punishment in the community', that this was what the public wanted. Whether the public will actually benefit from the addition of still more layers of punitiveness to community sentences is very

doubtful, but it cannot be expected to lead to any gains in effectiveness, as punishment is consistently found to be one of the least effective ways of promoting desistance (see, for example, McGuire 2004). In spite of these changes, probation staff continue to engage with service users, to look for co-operation and therapeutic alliance and to do their best to help people towards desistance, but the legal and institutional framework which used to support these activities has been progressively eroded.

### **Bringing probation back?**

In conclusion, can this brief review of history point to any ways in which probation's traditional contribution to sentencing and the criminal justice system might be restored? A number of suggestions follows. Space precludes a detailed discussion of evidence for or against each, and of course there are issues of feasibility and appetite for change; we may already have moved beyond some of these possibilities. However, if it is not too late, policy-makers might consider:

- Restoring more local decision-making and control in probation operations. Most crime control is local and informal, and perceived legitimacy is rooted in communities. A sense of even partial local ownership could do much to restore confidence, and local commissioning of services from voluntary organisations and even the private sector could be more responsive to local needs and make more effective use of local resources. If 'community prisons' with a locally-based resettlement and reintegration role ever become a reality, collaboration with a locally-based probation service would strengthen them. In addition, a strategy of greater local control would be expected to include devolution of criminal justice powers to Wales. (Recent proposals by the Association of Police and Crime Commissioners to take over probation might meet the criterion of localism to some

degree, but would expose the Service to competition for resources as the Commissioners oppose ring-fencing of finances – see Association of Police and Crime Commissioners 2018.)

- Recreating judicial involvement in the local governance of probation services and the setting of local priorities, giving the courts an input into defining what they want and need (for example, in the 1990s they clearly wanted reports which helped them to understand defendants' lives and motivation [Gelsthorpe and Raynor 1995] and there is evidence that they are concerned that the focus on speedy throughput of cases can work against justice [Donoghue 2014]);
- Developing a clear policy framework repositioning community sentences at the centre of a strategy to replace short prison sentences;
- Allowing more pre-sentence reports to focus on developing rehabilitative proposals in agreement with the defendant, with enough time to do this;
- Restoring the requirement of consent to a community sentence (possibly even restoring the probation order as one of a range of options);
- Concentrating more resources on staff development and in particular the development of staff practice skills (recent research shows that highly skilled staff make as much or more difference to reconviction rates as having the right programme designs - see Chadwick et al. 2015; Ugwudike et al. 2017);
- Ensuring regular supervision by experienced staff who understand and use practice skills themselves (recent research also shows that this makes a difference – see Bourgon et al. 2010). Ideally this should happen within a Service managed by people who understand what it is for, what it does and what it potentially could do.
- Evaluating outcomes continuously, and designing new initiatives so that they *can* be evaluated (Raynor 2004);



- Reversing the privatisation. TR clearly has not worked, and it shows very few signs of working any time soon, even though large additional sums of money have been allocated to failing Community Rehabilitation Companies (CRCs). The most cost-effective solution is to find a way to unravel the contracts and restore the control of probation operations to probation services (including any useful innovations which some CRCs might by then have developed). Restoration could take some time, as the contracts, like most privatisations, are hard to unravel. However, the same civil servants who showed great energy and ingenuity in setting up TR to a tight timetable should surely be equal to the task of correcting the mistake.
- Encouraging politicians to focus on effectiveness instead of crowd-pleasing.

Of course all this can be dismissed as unrealistic and Utopian. But is it any more Utopian than ‘conditional suspension of punishment, and personal care and supervision by a court welfare officer’ (Grünhut 1952, 168)? And we know that when done with the right people in the right way, this works.

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